IN THE

Supreme Court of the United States

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October Term, 1944
No. 723

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,
Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Writ of Certiorari and Brief in Support Thereof.

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IN THE

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No. .....

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,
Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA.
Appellees.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Your petitioners, Emanuel Max Cohen and Albert Charles Schnee, respectfully petition this Honorable Court for a writ of certiorari directed to the Ninth Circuit Court of Appeals to review the judgment and order of said court, affirming the judgment of conviction (after first reversing the same) of conspiracy to ask a bribe.

This case involves the important question of interpretation of the Selective Service Act and the military status of a person inducted into the armed forces of the United States.

A.

JURISDICTION.

Jurisdiction Is Conferred on This Court by Title 18, Section 347, United States Codes.

The first decision of the Ninth Circuit Court of Appeals which reversed the judgment of the lower court was rendered on May 19, 1944. This decision is attached hereto as an appendix. The Government filed a petition for rehearing on June 17, 1944. On August 26, 1944, the court granted the petition for rehearing and resubmitted the cause for consideration and decision on the record and briefs on file. The Government's petition for rehearing contained directives and other matters heretofore not presented in the courts in any proceeding. No further oral argument or other hearing was ordered by the court [R. 384, 385].

On September 29, 1944, the Ninth Circuit Court rendered a second judgment in the case affirming the lower court's judgment [R. 385, *et seq.*]. On October 23, 1944, and within the time allowed by law the appellants filed a petition for rehearing and for an order of the court vacating its last decision and the judgment, which petition was denied on November 6, 1944 [R. 400]. On application to the court the mandate was stayed to and including December 11, 1944, and until after this court passes upon this petition for certiorari [R. 401].

B.
SHORT STATEMENT OF THE CASE.

Petitioners were convicted of conspiracy (Title 18, Sec. 88) in Count II of the indictment charging them with conspiracy to ask a bribe from one James L. Sartor on March 6, 1943, the proceedings involving the application of said James L. Sartor for a recommendation for an extended furlough. Sartor was then already in the Army. Neither of the petitioners was in the Army; Emanuel Max Cohen was an appeal agent for Local Board 199 of the Selective Service; he is an attorney at law.

James L. Sartor was inducted into the United States Army on October 14, 1942 [R. 68]. At the time of his induction he was the owner of a retail liquor store at 424 North Main Street in Los Angeles, and also owned and operated a bar at that address and a store and apartment building at 3600 West Sixth Street in Los Angeles [Government's Exhibit 3, R. 85].

Sartor had secured various furloughs from the Army through a man named John E. Barr, who described himself as a publicity man, and who was called as a Government witness. Sartor had paid Barr several hundred dollars and Barr had in turn solicited the aid of the late Senator McNary of Oregon, who had communicated with Army officers in behalf of Sartor [R. 134-137].

On February 11, 1943, Sartor applied to the Army for an additional sixty-day furlough [R. 68, 69, testimony of Sartor, Government's Exhibit 1]. On February 17, 1943, Colonel Albert E. Merrill of the U. S. Army at Fort Douglas, Utah, wrote Sartor and informed him that his, Sartor's, request would be granted if his local draft board would so recommend [R. 69-71].

On March 1, 1943, Sartor called upon Emanuel Max Cohen, who was then Government Appeal Agent for Local Draft Board 199, and an attorney at law who had an office at the Hart Distillery where he was employed as one of their attorneys. Sartor exhibited to Cohen the letter from Colonel Merrill, and Cohen suggested that Sartor meet him at the office of Local Draft Board 199 in the evening. Sartor was a customer of the Hart Distilleries where Cohen was employed.

Cohen met Sartor at the office of the draft board later and discussed the matter, and in Sartor's presence dictated a letter to the Army authorities at Fort Douglas, Utah, on March 1, 1943. Sartor called at the draft board and picked up the letter dictated by Cohen and took it to Cohen's office for his signature, and personally deposited it in the mail [R. 71-74].

When this letter was received by the Army Chief of Staff at Fort Douglas the Chief telephoned Colonel Merrill, and instructed him to give Sartor the additional sixty days which Sartor had requested. This Colonel Merrill did on either the 4th or 5th day of March, 1943 [R. 178, testimony of Colonel Merrill]. (Note: This is before the date of any alleged conspiracy, which date is March 6, 1943.)

On the day that Sartor mailed the letter to the Army which Cohen had signed, to-wit, March 2, 1943, he took a copy of Cohen's letter to John E. Barr, who had been engineering Sartor's various previous extensions "for a fee" as Barr expressed it, Barr advised Sartor that Cohen's letter was not adequate for the Army authorities to act upon and that Sartor should see Cohen and get a recommendation [R. 137, testimony of John E. Barr].

On March 3, 1943, Sartor again called on Cohen, stating that the letter was inadequate, and sought a letter of recommendation. Cohen told Sartor that he himself had no authority to make a recommendation to the Army, and according to Cohen's testimony the following took place:

> "He showed me a pass of some sort and he said, 'By the way, the letter you wrote isn't sufficient and Fort Douglas asked for a recommendation.' And I told him that my duties don't permit me to make a recommendation. So he stated, 'However, the letter asked for a recommendation and I think the Board should make a recommendation.' I said, 'That is up to the Board to do.' I said, 'Where is the letter?' And he said, 'I don't know. It may be home.' And I said, 'Well, go home and find the letter.' Then he left and he came back later in the evening and he stated to me that he could not find the letter; he didn't know where it was. At that time I asked him how it happened that he got these other 60 day furloughs. You see, we had never had a situation like that at our Draft Board before. And he stated he got them through Senator McNary. I asked him how he came in contact with Senator McNary and he stated through a friend of his, Mr. Barr. I asked him if Mr. Barr would be familiar with the contents of that letter and he said: 'I don't know. He may.' I asked him how I can get in touch with Mr. Barr and he stated to me that he may be reached at the Council Press Room at the City Hall. I telephoned the Council Press Room and was unable to contact him. I then called Miss Celio, the clerk at the Draft Board, and I explained to her what I thought was the contents of that letter and asked her to communi-

cate with the Coordinator to find out whether the Board had jurisdiction to entertain such a recommendation. And she stated she would. And I told Mr. Sartor — I asked him for his phone number, which he gave me, and I told him that as soon as I found out I would let him know. A while later Miss Celio telephoned me and she told me that the Coordinator had stated that the Board would have jurisdiction to make a recommendation in such a situation. I didn't hear from Mr. Sartor that day any more. He came in the next day in the early afternoon. This was Thursday, the 4th of March, 1943. He came in and asked me what the Board said. I don't recall exactly, but words to that effect. And I told him that the Board had jurisdiction; that I will present it to them at the next—at a meeting on Saturday morning. And he asked me if there was anything I could do and I said, 'I have no right to make any recommendation. There isn't anything I can do except to present it to the Board. I will present all the facts to them.' And that was about the extent of the conversation. I also told him that he had better take care of his business affairs, because he had received so many furloughs that it was questioned in my mind whether he would receive very many more and that it was—that as far as his building was concerned, he could have a bank or a real estate broker manage the building for him while he was away, to collect the rent and pay the taxes and make whatever repairs were necessary, as far as his business was concerned." [R. 208-210.]

Cohen told Sartor that he would try to get him a purchaser for the store [R. 213].

Sartor conveyed these various conversations and transactions to his emissary Barr, who had arranged all of his various extensions with the Army.

On March 4th or 5th Sartor had already received a sixty-day extension from the Army on orders of Colonel Alberto Merrill. On March 6th Sartor was still unaware of the Army order granting him this extension, as were Cohen and the Local Draft Board 199.

On the morning of March 6th, at 10:30 o'clock, petitioner Cohen drove up in front of Sartor's place of business, stopped his automobile, blew his horn, and Sartor came out and talked with Cohen. At that time, Sartor said, Cohen stated to him that he had somebody who was going to help Sartor out and that this fellow's name was Davis; that Davis would call Sartor within the next ten or fifteen minutes; that Davis was going to help Sartor get an extension from the Army. Sartor said that Cohen then drove away [R. 75].

Petitioner Albert Charles Schnee has known petitioner Cohen for twelve years. He had not seen Cohen for some time prior to March 6, 1943 [R. 243]. Schnee was formerly connected with the Internal Revenue Department, and was at the time of this occurrence employed by 20th Century-Fox Film Studio. It had been Mr. Cohen's practice always to submit to Mr. Schnee his income tax returns [R. 218, 219].

On March 5, 1943, petitioner Cohen called Mr. Schnee, made an appointment to see him in his office the next morning, March 6th, at which time Mr. Schnee went over Cohen's income tax return after Cohen had explained to him that he had been recently married and that his wife was operating the business.

Cohen then told Schnee that he was the Government Agent for the Local Draft Board, and that a man named Sartor had made an application for deferment which was pending before his Board; that Sartor was the owner of a retail liquor store with a good location; that he, Cohen, was interested in buying a store, but did not desire to open negotiations in his own name as it might embarrass him as a Government Appeal Agent. Cohen requested Schnee to telephone Sartor to determine what price Sartor placed upon his business and to obtain an inventory from Sartor. Mr. Schnee called Sartor in Cohen's presence and Sartor suggested that Schnee telephone him back at 11:30 (March 6, 1943).

Cohen said that he had stopped by Sartor's place of business to have Sartor point out the packaged store which Sartor had, and Cohen told Sartor to wait before disposing of his store until after he found out what disposition the draft board had made in his case before he made any decision relative to the store [R. 214].

Cohen appeared before Local Draft Board 199 on Saturday, March 6, 1943, after 11 o'clock. He advised the Board that he was submitting the application of Sartor for an extension, without any recommendation. He did not urge the Board to act favorably [R. 185, testimony of Government witness Harry H. Harrison].

Sartor testified that at about 11 o'clock on the morning of March 6, 1943, he received a telephone call from a man named Davis; that Davis asked Sartor if he wanted an additional sixty-day furlough and Sartor said "Yes," and Davis said that it would cost him $2,000; Sartor said, "That is too much." He asked Davis to call

him up again, and said he would let him know later [R. 75-79].

Petitioner Schnee testified that after his first conversation with Sartor at 10 o'clock he did not call Sartor again until noon time, at which time Sartor said he wanted $2,000 for his business, plus inventory; that Schnee asked Sartor if he had an inventory, and Sartor said he did.

Schnee asked Sartor if he had a monthly statement, and Sartor replied in the affirmative. Upon Sartor's reply that he did have an inventory, there was some discussion as to how the delivery to Schnee of the inventory could be effected [R. 247, 248, testimony of James L. Sartor].

Sartor testified that Cohen came back to his store after 12 o'clock noon; that he, Sartor, went out and got into Cohen's automobile and he had a conversation with him. Sartor stated that Cohen had inquired if Davis had called and Sartor related that Davis had asked Sartor for $2,000, and that Sartor declared that it was too much money and Cohen said to Sartor that he, Cohen, did not have anything to do with it; that Sartor was dealing with Davis. Sartor said that Cohen then drove away [R. 80, testimony of Sartor].

Petitioner Cohen testified that after the hearing before the Draft Board on Saturday morning, March 6th, he drove back to Sartor's place of business and had a conversation with Sartor, relating to him that the Board had recommended an extension for him of thirty days, but cautioned him that this recommendation might not be acted upon by the Army authorities. He suggested that Sartor should open an escrow immediately, stating, in his opinion, that if Mr. Davis bought the store no difficulty

would be experienced in transferring the license. Sartor seemed to be very much upset about the matter [R. 216, 217, testimony of Emanuel Max Cohen].

(Note: The establishment of a conspiracy between Cohen and Schnee rests entirely upon evidence of the two conversations Sartor had with Cohen on the morning of March 6, 1943, immediately above referred to. Any inference supporting the Government's theory of conspiracy between Petitioner Schnee and Petitioner Cohen must legally rest upon the evidence of these two conversations. The conversation immediately above related was the last contact Cohen had with Government's witness, Sartor, who is named in the indictment as the person from whom a bribe was to be asked.)

Sartor testified that about 2 o'clock on Saturday afternoon, March 6, 1943, this man Davis called him on the telephone the second time and told him that for $500.00 he could get him a thirty-day furlough. Sartor agreed, and the man who represented himself to be Davis told him to put the money in an envelope and bring it down to the Burbank Theatre on Main Street and deliver it to a Mr. Popkin, who had an office in the theatre, at 2:30 p. m. [R. 83, testimony of Sartor].

Mr. Schnee said he called Sartor up a second time during the afternoon of March 6, 1943, and told him to place his inventory in an envelope and to take it to Mr. Popkin at the Burbank Theatre, he, Schnee, having previously called Mr. Popkin, who was an acquaintance of his, to receive the envelope from Sartor [R. 248, 249].

Immediately following the occurrence of the last telephone conversation between Schnee and Sartor, Sartor

testified he telephoned Government's witness John E. Barr, who had been previously handling the matter of obtaining Army extensions for Sartor, and advised Barr what had occurred [R. 83].

Barr, after Sartor had related these matters to him, went to the Auto Theft Detail where Barr had a friend named Officer Donovan, and Barr requested Police Officer Thomas Donovan to accompany him to Sartor's place of business. There Sartor, Barr and Donovan arranged that Sartor put $176.00 of money in an envelope after the numbers on the money had been recorded, and Officer Donovan and Barr took Sartor down to the Burbank Theatre where he delivered the envelope containing the money to Harry Popkin [R. 128, 129, testimony of John E. Barr].

After Popkin received the envelope Officer Donovan appeared and advised Popkin he was a policeman. Some prolonged argument ensued between Officer Donovan, Popkin and Government's witness Barr, and Popkin turned the envelope over to Officer Donovan [R. 129].

Mr. Popkin then telephoned Mr. Schnee and Officer Donovan listened in to the conversation. Popkin said to Schnee, "What the hell are you getting me into?" and Schnee said, "What do you mean?" Popkin then told Schnee about the enevlope with the money in it. Schnee said, "I know about the envelope, but what's this all about?" [R. 116, 117, testimony of Officer Donovan].

Following this telephone conversation Officer Donovan accompanied by Government's witness Barr went to the Twentieth Century-Fox Film Studio where they located Schnee, and had a conversation with him there. Schnee denied any criminality in connection with the matter,

whereupon Officer Donovan placed Schnee under arrest and subsequently took him to the detective bureau of the Los Angeles Police Department [R. 117, 122, 123, testimony of Officer Donovan].

Petitioner Schnee arrived at the police department at about 5:30 in the afternoon and was detained there until about 10:30 at night. The police department called in members of the Federal Bureau of Investigation. At 10:30 at night they took Mr. Schnee over to the office of the F.B.I. in the Security Building; he called his wife and asked her to have his lawyer, H. J. Ross, contact him at once. Schnee was denied an interview with his lawyer by both the police department and by members of the F.B.I.

Members of the F.B.I. interrogated Petitioner Schnee and attempted to induce him to sign a statement, which he refused to do. This fact was later introduced in evidence over objections. At 3:00 o'clock on Sunday morning, March 7th, after Schnee had consistently refused to admit criminal complicity in the matter, although admissions against his interest had been wrung from him, members of the F.B.I. took him to the county jail and incarcerated him there on the ground that he did not have his draft card in his possession, although he had explained to them that the draft card was home on his dresser [R. 253-258].

Attorney Ross testified that he tried constantly at both the police department and the Federal Bureau of Investigation to contact his client, Albert Charles Schnee, and was advised at both places that the man was not there and that they had never heard of him.

Attorney Ross had obtained Schnee's draft card and had it in his possession at all times while he was attempting to contact Mr. Schnee [R. 271-276, testimony of H. J. Ross].

After the cause was submitted and argued before the Ninth Circuit Court of Appeals, that court in reversing the judgment said:

> "In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not 'an officer of the United States or a person acting for or on behalf of the United States in any official capacity' nor could he in the circumstances 'ask . . . money with intent to have his . . . action on any . . . matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby.'
>
> "Appellant Cohen, then, could not have committed an offense against the United States under §207, Title 18, U.S.C.A., as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United

States v. Furer (D.C. Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (D.C. Mo.), 85 Fed. 425, 436; United States v. Gibson (D.C. Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

"Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act."

The Government, following this decision, filed a petition for rehearing, in which it asked for a rehearing, among other grounds, because of the fact that the court's decision "creates a dangerous precedent" "and vitally affects the present functioning of the selective service system during the present war."

In this petition for rehearing the Government set out for the first time a number of directives in the selective service. None of these directives was introduced in evidence before the trial court or in the trial of the case. They are directives within the bosom of the selective service and the military authorities; they are not a part of the federal register.

One of the directives was dated May 8, 1943, subsequent to the date alleged in the conspiracy.

The Ninth Circuit Court granted the petition for rehearing and thereafter affirmed the judgment it had previously reversed, basing its affirmation on some of the directives introduced in evidence before that court for the first time and without any hearing thereon. Nor was there a date set for oral argument before the Circuit Court of Appeals. Some of these directives found their way into the final opinion of the court [R. 391, 392].

Upon affirmation of the judgment petitioners then petitioned the Circuit Court to rehear the case, not only to hold oral arguments on the matters which had been reconsidered by the court on rehearing and from the Government's brief, and to vacate its judgment, but also to eliminate from its consideration matters which had not been introduced in evidence in the trial of the case but which had been presented to the Circuit Court for the first time on appeal.

The petition to vacate its judgment and grant a rehearing and oral argument and to consider the matters thus raised was denied by the Circuit Court on November 6, 1944.

C.

A HEARING SHOULD BE GRANTED BY THIS COURT TO DECIDE THESE NEW AND IMPORTANT QUESTIONS OF CRIMINAL LAW AND CRIMINAL PROCEDURE.

1. Has a Circuit Court of Appeals the right to take into consideration the secret selective service or military directives without a hearing, without a cross-examination, or without any testimony being presented in the trial court or in the Circuit Court, and base a decision upon such directives and such new data presented to it for the first time?

2. Has a Circuit Court of Appeals the right to take into consideration and take judicial notice of secret directives of the military authorities or selective service? Has any court the right to take judicial notice of secret directives without any witnesses?

3. When a man is inducted into the Army and is under military control, does the Selective Service Board or any attache thereof have any jurisdiction over such inductee?

4. If a military officer having complete control over an inductee asks one not in the military service for a recommendation, does such request change the status of the inductee or of the person who is requested to make the recommendation?

5. Where a directive refers to a "state director of selective service" may this be enlarged by the court to refer to the "local board"?

6. May the duties of a Government Appeal Agent in the selective service be extended beyond the scope of the express authority granted by statute?

7. Where a furlough has already been granted to an inductee by the military authorities who have jurisdiction over him, can one who is not in the military service and who has no control over the inductee be guilty of asking a bribe on the following day after the furlough has already been granted and for which the bribe is allegedly solicited?

8. Was it error for the Government to introduce in evidence the refusal of Petitioner Schnee to sign a statement at the F.B.I. headquarters following his arrest, which refusal was in effect, standing on his constitutional right?

9. Was it error for the court to permit in evidence statements taken by the F.B.I. subsequent to the arrest of Schnee and after the termination of the alleged conspiracy?

10. Was it error for the trial court to permit to go before the jury the purported statement of Schnee taken at the offices of the F.B.I. and before he was arraigned before any magistrate, and when he was not permitted to have counsel or to be advised of his legal rights?

11. Where a petition for rehearing by the Government is granted by the Circuit Court of Appeals, and that petition contains new matters not theretofore presented or argued, should the Circuit Court of Appeals, after granting a rehearing, give the appellants an opportunity for oral argument before deciding the case adversely to such appellants, on the basis of new matters thus presented on the petition for rehearing?

D.
GROUNDS OF GRANTING PETITION FOR CERTIORARI.

The questions raised by this petition are new and of great importance in the aspects of supervisory criminal procedure, as well as from the standpoint of the correct interpretation of military and civil law today.

The case involves:

1. The status of an inductee after induction into the service and his relationship with the appeal agent of his former selective service board.

2. The jurisdiction of the Circuit Court of Appeals in taking into consideration new matters upon appeal, not presented by any witness.

3. Whether a court may take judicial notice of secret military or selective service directives.

4. Whether one may be convicted of asking a bribe to influence him when (a) the thing that he asks a bribe for has already been done; (b) the thing requested is not one that involves any statutory duty on his part.

5. Whether a refusal to sign a statement at the F.B.I. headquarters may be used against one in the trial of his case.

6. Whether the statements taken after an alleged conspiracy, and while one is in custody at the F.B.I., but has never been arraigned and never been permitted to have counsel (and counsel has actually been refused permission to see him)may be used in evidence against the accused.

It is respectfully submitted that these questions are of great importance in the present military and civil handling of inductees and in the supervisory control of this court over criminal procedure, and that this court should there-

fore grant a hearing because of the great importance of the issues involved and for guidance to courts and boards throughout the country.

It is also urged that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this court, and further, that it extends the statutory rights and duties of state directives, local boards and Government appeal agents, and also the application of a statute beyond the fair scope of its intendment.

E.

CASES AND STATUTES BELIEVED TO SUSTAIN JURISDICTION.

U. S. Codes, Title 28, Sec. 347;

U. S. Codes, Title 18, Secs. 18 and 207;

Selective Service Regulations, Sec. 603.71.

The Circuit Court of Appeals may not take into consideration matters not a part of the record certified to the Circuit Court of Appeals by the District Court.

Criminal Appeals Rules VIII and IX;

Edwards v. United States, 312 U. S. 473, 480, 85 L. Ed. 957, 963;

The Federal Register Act, Title 44, Secs. 305, 307.

Selective service directives are not published in the federal register.

Directives are not judicially noticed.

Burke v. Tregre, 19 Wall. 519, 526, 22 L. Ed. 158.

A statute may not be extended beyond its language.

Vierick v. United States, 318 U. S. 236, 253, 87 L. Ed. 734;

Pierce v. United States, 314 U. S. 306, 36 L. Ed. 226.

It is impossible for an official to violate Section 207 of Title 18, U. S. Codes (Section 117 of the Criminal Code) by asking for money with intent that it influence him on a matter before him if that matter has already been accomplished or is not before him officially, or in his official capacity.

Pierce v. United States, 314 U. S. 306, 36 L. Ed. 226;

Thornhill v. Alabama, 310 U. S. 88, 96, 85 L. Ed. 1093, 1099;

De Jonge v. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278;

Stromberg v. California, 283 U. S. 359, 367, 368, 75 L. Ed. 1117-1123;

Woo Wai v. U. S., 223 Fed. 412.

It was error for the court to admit the evidence of proceedings at the F.B.I.

Benson v. United States, 27 Atl. (D. C.) 331;
In re Yee Gee, 83 Fed. 145;
Logan v. United States, 144 U. S. 263, 309;
McNabb v. United States, 318 U. S. 332;
Anderson v. United States, 318 U. S. 350.

The defendants had no official authority or capacity as Sarbor was inducted.

The Selective Service and Training Act of 1940, Public Act 783, 76th Cong., approved September 16, 1940;

Billings v. Truesdale, decided by this court March 27, 1944, 88 L. Ed. 573.

Respectfully submitted,

MORRIS LAVINE,

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